PRIVY COUNCIL APPEAL

T.O. THOMAS v. ASIA FISHING INDUSTRY (PTE) LTD.

[Federal Court Civil Appeal No. 39 of 1976]

The appellant's petition for special leave to appeal to His Majesty the Yang di-Pertuan Agong in the above matter ([1977] 1 M.L.J. 151) was dismissed with costs by the Privy Council on February 16, 1978.

Petition dismissed.

PRIVY COUNCIL REPORT

CHOW YEE WAH & ANOR. v. CHOO AH PAT

[Privy Council (Lord Diplock, Lord Simon of Glaisdale, Lord Fraser of Tulleybelton, Lord Scarman, and Sir John Pennycuick) May 3, 1978]

[Privy Council Civil Appeal No. 43 of 1975]

Trust — Personal property — Joint account by deceased in name of himself and first appellant for benefit of common law wife — Whether deceased was of sound mind at time cheque drawn up.

Practice and procedure — Appeal — Principles on which appellate court should act in reviewing finding of fact.

In this case the deceased had prior to his death drawn a cheque for $60,384.80 and paid it into a joint account which he opened in his name and the name of the first defendant for the benefit of his common law wife. The questions that arose for consideration were (1) whether or not the deceased was in full possession of his mental faculties when his thumbprints were affixed to the said cheque and documents; and (2) whether the presumption of a resulting trust was rebutted as there was a valid trust in this case. The learned trial judge, Abdul Hamid J. decided both questions in the affirmative and dismissed the respondent's claim to recover the money as administratrix of the estate of the deceased ([1974] 1 M.L.J. 62).

On appeal ([1975] 1 M.L.J. 245), the Federal Court in allowing the appeal held (1) the facts in the case showed that the deceased was not in full possession of his mental faculties when his thumbprints were affixed to the cheque and other documents; (2) in view of the uncertainty of the deceased's intention in this case there was no evidence of an express trust to rebut the resulting trust which arose. The appellants appealed to the Yang Dipertuan Agung. Two main issues were raised on the appeal. The first was whether the money was validly transferred by the deceased into the joint account or whether the cheque purporting to make the transfer was invalid on one of the several grounds alleged by the respondent. This was a question of fact which depended on the mental capacity of the deceased at the material time. The second question was whether, if such transfer was validly made, an effective trust was set up relating to the amount transferred. This was a question of law.

Held, allowing the appeal: (1) in the face of the finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion. In this case the reasons stated in the judgment of the Federal Court for disbelieving the defence witnesses fell short of what was required to entitle that court to reverse the decision of the trial judge who accepted them as truthful. The first question must therefore be answered as the trial judge answered it in favour of the appellants;

(2) the evidence in this case disclosed an intention on the part of the deceased, which was sufficiently clear and precise to impress the money with a trust for the benefit of his common law wife. The decision of the deceased was rational in itself and in the manner in which it was made and there was no reason to doubt that a valid trust was duly constituted by the deceased during his lifetime.

Cases referred to:-

(1) *Watt or Thomas* v. *Thomas* [1947] A.C. 487 at p. 487.

(2) *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 92.

(3) *Powell and wife* v. *Streatham Menor Nursing Home* [1935] A.C. 243, 249.

(4) *Clarke* v. *Edinburgh Tramways Co.* 1919 S.C. (H.L.) 35, 36.

(5) *Russell* v. *Scott* (1936) 55 C.L.R. 440, 449.

(6) *Standing* v. *Bowring* (1885) 31 Ch. D. 282, 287.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Mervyn Heald Q.C. (*George Newman* with him) for the appellants.

R.R. Chelliah (*Joginder Singh* and *G. Sri Ram* with him) for the respondent.

Lord Fraser of Tullybelton (delivering the judgment of the Board): This is an appeal from the Federal Court of Malaysia which allowed an appeal from the judgment of the High Court in Malaya (Abdul Hamid J.). It concerns a dispute as to who is entitled to a sum of $60,384.80. According to the appellants, the money was put in trust by a dying man as a provision for his widow and has been properly paid over to her; according to the respondent, it was obtained fraudulently from an unmarried man, when he was mentally incapable of understanding what he was doing, and ought now to be restored to his estate. Two main issues are raised. The first is whether the money was validly transferred by the late Loke Yaik Hoe ("the deceased") into a joint account in names of himself and the first appellant at the Pasar Road branch of the second appellants' bank, or whether the cheque purporting to make the transfer was invalid on one of the several grounds alleged by the respondent. This is a question of fact, the answer to which depends on the mental capacity of the deceased at the material time. The second question is whether, if such transfer was validly made, an effective trust was set up relating to the amount transferred. This is a question of law. Both questions were answered by Abdul Hamid J. in favour of the appellants, but his decision on both points was reversed by the Federal Court.

The trial judge's decision on the first question, the question of fact, was reached after he had heard a considerable volume of evidence, some of it sharply conflicting, and had accepted the appellants' evidence, and rejected the respondent's. The principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated in many cases in the House of Lords and in this Committee, and it will be appropriate to quote from two of them. In *Watt or Thomas* v. *Thomas*[1] Lord Thankerton said this:—

"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

That passage was quoted with approval in the judg-

ment of this Board, delivered by Lord Guest in *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.*[2] When Lord Thankerton referred in paragraph (1) to "the printed evidence" he was referring to a transcript of a verbatim shorthand record of the evidence, such as was available in that case. But in the instant appeal all that the Federal Court had before it was the judge's notes of the evidence, perhaps augmented in places by a transcript of shorthand notes, and it is obvious that the disadvantages under which an appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has a verbatim transcript.

The second case from which it is appropriate to quote is *Powell and wife* v. *Streatham Manor Nursing Home*[3] where Viscount Sankey L.C. said this:

"What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke* v. *Edinburgh Tramways Co.* per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says:

'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'."

The first part of that quotation from the speech of Viscount Sankey shows that there is no room for an argument which was at least adumbrated on behalf of the respondent in the instant appeal to the effect that the principle of *Thomas* does not apply to the appeal to the Federal Court because it is the appeal by way of rehearing — Courts of Judicature Act, 1964, section 69. Their Lordships would add that the instant case falls within the class referred to in the quotation from *Clarke* v. *Edinburgh Tramways*[4] in which the judge has announced as part of his judgment that he believes one set of witnesses and disbelieves the other.

The respondent (the plaintiff) is the mother of the deceased and she sues as administratrix of his estate. She was the second wife of the deceased's father. The deceased died on July 24, 1967 without issue. Since 1961 he had lived with a woman named Chan Yoke Ying ("Madam Chan"). The legal status of their relationship is disputed. The appellants maintain that Madam Chan was the deceased's lawful wife, while the respondent maintains that she was merely his mistress. The trial judge held, rightly in their Lordships' opinion, that it was unnecessary to decide whether there had been a valid marriage. The important thing was, as the learned judge further held, that Madam Chan was someone with whom the deceased had shared his life since 1961 and for whom he would naturally wish to make provision after his death. The respondent admitted that she very much disliked Madam Chan and disapproved of the deceased's relationship with her.

The first appellant was the deceased's brother-in-law, being married to one of his half sisters. He and the deceased had acted as executors of the deceased's father's estate and he was a trusted friend of the deceased. The manager of the second appellants' branch at Pasar Road was a nephew of the deceased. He was apparently on friendly terms with the deceased and he took an active part in the events which are of central importance on the first question.

The deceased was admitted to the General Hospital, Kuala Lumpur, on July 13, 1967 and he died there on July 24, 1967. The disputed sum of money was transferred from his account at the head office of the second appellants to their branch at Pasar Road by a cheque drawn by the deceased dated July 18 and cleared on July 20. The respondent's pleadings alleged that the cheque was invalid on a number of alternative grounds including forgery and undue influence. Several of these serious allegations appear to have been based on nothing more than suspicion and they were entirely unsupported by evidence at the trial. At the end of the trial there was only one substantial matter for decision, namely whether the deceased was unconscious, or so ill that he did not know what he was doing, when his cheque was authenticated by adhibiting his thumb mark. At the time of his admission to hospital he was seriously ill, suffering from hypertension with cardiac failure and also from liver disease secondary to the cardiac failure and from renal failure. His physical condition deteriorated gradually until his death and as a result of his physical illness, and especially of the renal failure, his mental condition was to some extent impaired. The question is whether it was so far impaired that at the time when he executed the cheque on July 18 he was incapable of understanding what he was doing.

The learned judge heard a considerable volume of evidence relating to that matter. The witnesses

fall into three main groups. The first group consists of the doctors who attended the deceased while he was in hospital between July 13 and 24, 1967. Their evidence dealt in detail with the deceased's physical condition but it was based almost entirely on clinical notes and not on actual recollection. That is not surprising as it was given in June 1972 and April 1973, about five years after the death. The doctors did not examine the deceased for the purpose of assessing his mental condition and their evidence was generally to the effect that it fluctuated from time to time while he was in hospital; it "waxed and waned" as one of them put it. The furthest that any of the medical witnesses went in support of the respondent's allegations was in a statement in Dr. Daljit's evidence that "at no time at all" was the deceased in a position to know what he was doing. But the opinion was only an inference based on the notes made by himself and the nurses, and the witness stated that if he had not seen these notes he could not have remembered anything about this patient. The learned trial judge's conclusion was that none of the medical witnesses could say exactly what the deceased's mental condition was at the time when he executed the cheque and the associated documents giving authority for opening and conducting the joint account.

The second group of witnesses consisted of the respondent herself and her adopted daughter. The respondent said that the deceased was never conscious at all while he was in hospital and that at no time during her visits did he utter a word. She was disbelieved by the judge, who said that he found that evidence hard to believe, and who also commented that she was "prepared to go to any length, to lie if necessary, in order to win the case". Their Lordships would add that, even if this witness had been believed, her evidence would not necessarily have led to the conclusion that when the deceased executed the cheque (at a time when the respondent was not present) he was unconscious or unable to understand what he was doing.

The third group of witnesses was made up of the first appellant, Kwan Mun Koh (nephew of the deceased and manager of the second appellant's branch at Pasar Road), Madam Chan and Dr. Loke Wai Tuck. Dr. Loke was another nephew of the deceased. He arranged for the deceased's admission to hospital and visited him there almost daily, apparently on a social rather than a professional basis. These four witnesses all said that the deceased's mental condition was not confused when they saw him in hospital. All of them except Dr. Loke said they were present on the evening of July 18 when the deceased executed the cheque and other documents and that he understood what he was doing. Kwan Mun Koh wrote in the amount and other particulars in the cheque. These witnesses also explained certain matters that might reasonably have caused suspicion. They explained that the reason why the deceased authenticated the cheque with his thumb mark, instead of signing it as was his usual habit, was that his hand was swollen so that he had difficulty in holding a pen. On July 11, 1967, two days before the deceased went into hospital, he had expressed to Kwan Mun Koh a strong wish to make provision for Madam Chan and to open a joint account with the first appellant so that the latter could look after Madam Chan. The reason for putting the money in trust for Madam Chan instead of handing it over to her directly was that she was illiterate. The learned judge expressly found that the first appellant had indeed used the money solely for the benefit of Madam Chan after the death of the deceased. The learned trial judge also said that Kwan Mun Koh had impressed him as a "witness of truth" and gave the whole group an express certificate of credibility as follows: —

> "Suffice if I say I have considered very carefully the evidence of each of these witnesses. I am satisfied that no attempt has been made by any of them to fabricate. I have cautioned myself of the need to be fully satisfied of the veracity of their testimony. These witnesses knew the deceased's habit and mannerism intimately, and, without meaning to discredit or to reject the doctors' testimony, I think Kwan Mun Koh and [the first appellant] have proved to my satisfaction that deceased knew the nature and effect of what he was doing when he affixed the thumbprints on the cheque and mandate. Indeed, I am satisfied of the propriety of the transaction."

In face of that finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion, as the authorities already quoted show. There is no indication in the judgment of the Federal Court (delivered by Ali F.J. with Gill C.J. and Ong F.J. concurring) that the learned judges had in mind the principle on which an appellate court should act in a case such as this. The conclusions of the judge who had heard the witnesses are quoted but without apparent recognition of the weight to which they are entitled.

The judgment of the Federal Court necessarily involves rejecting the evidence given on behalf of the appellants, and the rejection was in effect expressed in the following sentence:

> "The various gaps in the evidence of first respondent and Kwan Mun Koh and also [Madam Chan's] interest in this case make it difficult for me to accept as true that deceased voluntarily thumbprinted the cheque and documents as stated by them."

Their Lordships read the reference to "gaps" in the evidence as intended to refer back to questions raised earlier in the judgment about where and when the amount of the cheque was written, the date when the cheque was sent to the head office of the bank, why the first appellant's signature appears twice on the application for the joint account and why the deceased's address was not stated there. The first of these "gaps" was explained by the evidence of the first appellant and Kwan Mun Koh, the second seems to be of little importance as the cheque was certainly cleared by the head office on July 20 (two days after it was written and four days before the death of the deceased), and the other two gaps do not appear to be of material significance. Evidence about the execution of the cheque and documents was given by the first appellant, by Kwan Mun Koh and by Madam Chan and their evidence was substantially in agreement. Their Lordships are therefore unable to understand the statement in the judgment of the Federal Court that "defence evidence should not have been accepted without corroboration" unless it is to be read as meaning that corroboration is required from a witness who had no interest in the signing of the

cheque and who can be regarded as independent. No doubt evidence from such witness would have been useful as an additional safeguard, but it is by no means essential. Their Lordships are of opinion that the reasons stated in the judgment of the Federal Court for disbelieving the defence witnesses fall far short of what is required to entitle that court to reverse the decision of the trial judge, who accepted them as truthful. Their evidence, if believed, is fatal to the claim of the respondent that the deceased's authentication of the cheque was obtained by improper means. Their Lordships are therefore of opinion that the first question should be answered as the trial judge answered it in favour of the appellants.

The second question is whether an effective trust was set up relating to the amount transferred to the joint account. When the disputed cheque was paid into the joint account the legal title to the money in the account vested in the deceased and the first appellant. On the death of the deceased it remained in the first appellant as the survivor, but, as the money had all been provided by the deceased, it would, in the absence of any express trust, have been held by the first appellant upon a resulting trust for the deceased's estate. That is because of the well settled rule that

"Where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by shewing that at the time the transferor intended a benefit to the transferee..." — *Standing* v. *Bowring* (1885) 31 Ch. D. 282, per Cotton L.J. at 287.

In the present case the trial judge held that the presumption of resulting trust had been rebutted by proof of the deceased's intention to benefit not the transferee himself but Madam Chan, for whom the transferee (the first appellant) was to hold in trust the balance in the account at the date of the deceased's death. The Federal Court, differing from the trial judge, held that the presumption of resulting trust had not been rebutted. They held that

"in view of the uncertainty of the deceased's intention... there was no evidence of an express trust to rebut the presumption of a resulting trust...."

That was the ground of their decision on the second question and it was the only ground on which it was supported in argument, and their Lordships' observations are limited to dealing with it. No submission was made to the effect that the deceased had retained dominion over the balance in the account during his lifetime so that the gift to Madam Chan was truly testamentary and could only have been validly made by a will.

It is purely a question of intention whether the presumption has been rebutted or not — *Russell* v. *Scott*,[5] per Starke J. In judging of the intention it is proper to have regard to the special circumstances of the case including the relationship of the parties and any other relevant circumstances. It may be useful to recall the words of Lindley L.J. in *Standing* v. *Bowring*,[6] *supra* at p. 289: —

"Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

In the present case there is no uncertainty about the property to be affected by the trust, if there was a trust; it was the whole balance in the joint account at the date of the deceased's death. But it is said that the deceased's intention, which according to the evidence of the first appellant and of Kwan Mun Koh was that the former should use the money to look after Madam Chan, was too vague and uncertain to constitute a trust. The conclusion of the learned trial judge was expressed thus:

"To sum up, I would say that in the present case, there is not the slightest doubt in my mind that the eceased had the necessary intention from the very beginning, concerned with the welfare and interest of his wife in the event of his death, to make provision for her while he was still alive."

Their Lordships did not understand it to be suggested that that was other than a fair inference from the evidence. It discloses an intention which, in the opinion of their Lordships, was sufficiently clear and precise to impress the money with a trust for the benefit of Madam Chan and they are unable to agree with the view of the Federal Court that it was too uncertain. The deceased's reason for opening the joint account when he did was, as the trial judge said, presumably that he was aware that his illness was serious and that he might not live long. His reason for putting the money in trust was very probably that he knew Madam Chan was illiterate. The provision did not exhaust the whole of the deceased's estate. His decision was rational in itself and in the manner in which it was made, and their Lordships see no reason to doubt that a valid trust was duly constituted by the deceased during his lifetime.

A separate argument was addressed to their Lordships on behalf of the appellants to the effect that, even if the money belonged to the deceased's estate, it had not been shown that liability for restoring it rested upon these appellants. They do not hold the money. They have paid it over to Madam Chan and she is not a party to this action. No reply to this argument was made by counsel for the respondent. In view of their Lordships' conclusions on the other questions they find it unnecessary to consider this argument further, but they do not wish it to be assumed that they regard the argument as being without substance.

Finally, their Lordships would observe that considerable unnecessary expense has been incurred in this case by reproducing material that was not required for the purpose of the appeal. The great majority of the documents reproduced and included in Volumes II and III of the Record were not required. The notes by the judges of the Federal Court of counsel's arguments to them, which were included in Volume I, and the written submissions of counsel to the court below, were also unnecessary and ought not to have been reproduced.

Their Lordships will advise the Yang di-Pertuan Agong that the appeal should be allowed and that the judgment of Abdul Hamid J. should be restored. The respondent must pay the costs of this appeal and the proceedings in the courts below.

Appeal allowed.

Solicitors: *Coward Chance; Jansons.*